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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 272.

W. A. MARSHALL & CO., INC.,
Petitioner,

against

Steamship "PRESIDENT ARTHUR", her engines, boilers, etc.,
Respondent.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GEORGE WRIGHT HINCKLEY,
for the Petitioner.

PRESS OF FREMONT PAYNE, NEW YORK CITY

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Supreme Court of the United States

October Term, 1928.

No. 272.

W. A. MARSHALL & CO., INC.,
Petitioner,
against
Steamship "PRESIDENT ARTHUR," her engines, boilers, etc.,
Respondent.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This suit is by petitioner, coal suppliers of the Steamship "President Arthur," to establish a maritime lien for a portion of the purchase price of bunkers supplied that steamship. On the opinion of the District Court, Southern District of New York (22 Fed. [2d] 584), a decree was entered, dismissing the libel. This decree was affirmed by the Circuit Court of Appeals for the Second Circuit, Judge Learned Hand dissenting (25 Fed. [2d] 648), and this court granted certiorari (49 Sup. Ct. Rep. 22) pursuant to Section 240 (a) of the Judicial Code.

The grounds on which the Writ of Certiorari was sought were: that the decision below is in conflict with the applicable decisions of this court and with the decisions of Circuit Courts of Appeals for other circuits and that it nullified the Merchant Marine Acts of 1910 and 1920.

The decisions of this court with which it is believed the decision below is in conflict are:

The Kimball, 3 Wall. (70 U. S.) 37;
The Emily Souder, 17 Wall. (84 U. S.) 666;
The Bird of Paradise, 5 Wall. 72 (U. S.) 545;
Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1.

The decisions of Circuit Courts of Appeals of other circuits with which it is believed the decision below is in conflict are:

El Amigo, 285 F. [C. C. A. 5.] 868;
Ricou v. Fairbanks Morse & Co., 11 F. (2) [C. C. A. 5.] 103;
Leschen Rope Co. v. Mayflower G. M. & R. Co., 173 F. [C. C. A. 5.] 855.

Statement.

The question in this case is whether a supplier of bunker coal for a specific vessel, when such supply is made pursuant to contract containing provisions as to terms of payment, has a maritime lien therefor.

There is no conflict in the testimony in this case as libellant's witness alone was called.

Early in 1925, the petitioner contracted with the American Palestine Line, owner of the Steamship "President Arthur," for the supply of approximately 4,150 tons of coal as bunkers for that vessel. In the negotiations for the supply, it developed that owner did not want to pay for the coal on delivery or even in thirty days, the terms usually granted. It wanted sixty days, but petitioner wanted to be in a position "to get the money at any time they wanted" (R. 9). Accordingly petitioner insisted upon trade acceptances as a means of payment so that by discounting these it might, if it desired, be put in funds prior to the day ultimately stated for payment (R. 9). Investi-

gation disclosed that owner's paper was not discountable, on account of its lack of substantial financial standing, and so acceptable indorsements were demanded in order that the trade acceptances might be readily discounted and also as "additional security." These were the sole purposes in payment by acceptances and of the indorsements thereon (R. 12, 13).

Two contracts, dated February 18, 1925, and March 4, 1925, respectively, resulted from these negotiations. The terms of payment provided therein were as follows:

> "The buyer will pay for the said coal as follows:
>
> (1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> (2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb" (R. 15, 17).

The coal was delivered and the acceptances given (R. 8, 11). The first acceptance, for an amount equal to the railroad freight on the coal delivered under both contracts, was paid at maturity (R. 11). The second acceptance, for the balance due under both contracts, was not and never has been paid (R. 22).

The libel herein for the unpaid balance of the purchase price was filed and the "President Arthur" arrested May 11, 1925 (R. 1). A civil action upon the unpaid acceptance, but against the indorsers only, was commenced in

the state court June 18, 1925, and is still pending and undetermined (R. 5, 12). Respondent offered in evidence two affidavits submitted by petitioner on a motion for summary judgment in such civil action (Claimant's Exhibits C and D, R. 20-25), in which affidavits the indorsement of the acceptance by the individuals there sued was stated to have been "part of the consideration" for the sale of the coal (R. 22, 24).

Both the District Court and the Circuit Court of Appeals have dismissed the libel.

The primary ground of decision of the District Court is that as the contract required payment coincidentally with the delivery of the coal by delivery of trade acceptances of the owner, bearing three indorsements, fulfillment of this requirement was payment and hence no lien could arise (R. 27).

The grounds of decision of the Circuit Court of Appeals, to which a dissenting opinion was written by Judge Learned Hand, may be summarized as follows:

First: "Where parties agree to an express contract as to payment" [even though this be by notes of the original debtor] "the contract becomes extinguished by full performance" [that is by the mere giving of the notes even though they be not paid at maturity] "and so it is impossible that either party should have any claim against the other arising out of the contract" (Opinion, R. 33).

Second: Cash was not contracted for, but a payment other than cash was provided by the contract, hence "* * * If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and

to waive his lien, unless he stipulates that the liability of the vessel shall still continue. Phelps v. The Camilla, Taney 400, Fed. Cas. No. 11073 (Md. 1838) : '" (Opinion, R. 32).

Third : The Merchant Marine Act of 1920, which provides that to support a lien "it shall not be necessary to allege or prove that credit was given to the vessel," provides also that nothing in that act shall prevent the furnisher of supplies from waiving his right to a lien by agreement or otherwise. The right to the lien may be displaced "by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right." Requiring indorsements of owner's acceptances was such a stipulation; *ergo* "the appellant relied solely upon the indorsement and not upon the maritime lien" (Opinion, R. 32, 34).

Summary of Argument.

An "acceptance" is in effect a note, the acceptor being primarily liable as is the maker of a note. By both the commercial and maritime law the note of the original debtor, even when given pursuant to contract provision, is but an additional promise to pay. It is everywhere treated as conditional payment merely. Accordingly, until such note is paid, it can not discharge the original obligation. The Circuit Court of Appeals disregarded these principles and its decision is in conflict with applicable decisions of this court (Point I, *infra*, p. 6).

The Maritime Lien Act of 1910, which in respect of the point involved here was not substantially changed by the Act of 1920, settled the confusion arising through early decisions of this court and gave to the supplier on owner's order a maritime lien. He need not allege or prove he relied on the credit of the vessel. The lien is presumed and this presumption can be destroyed only by clear and affirmative proof of waiver by the party that alleges it (Point II, *infra*, p. 10).

The mere fact that owner's notes were taken does not waive the lien nor does a provision in the contract for payment by owner's notes waive the lien. The Circuit Court of Appeals held to the contrary and its decision is in conflict with applicable decisions of this court and of the Circuit Court of Appeals for the Eighth Circuit. So too, the requirement of indorsements of owner's notes not being incompatible or irreconcilable with the existence of the lien did not waive it. The Circuit Court of Appeals for the Fifth Circuit has held that maritime liens are not waived by taking other security. With these decisions, the decision below is in conflict (Point III, *infra*, p. 14).

POINT I.

The note (the acceptance) of the owner, even when received under the contract, is not such payment as to satisfy and terminate the original obligation unless the note itself be paid.

The first question is obviously whether the "acceptances," given and received pursuant to the contract, were such payment as to discharge the debt for if so either no lien arose or was forthwith discharged whatever might be its character.

The terms of the contract in respect of payment appear at page 3 of this brief. It is there provided that payment shall be made by means of the drafts of the seller, accepted by the buyer and indorsed by three named parties. This form of paper, even when unindorsed, is known as a "trade acceptance."

The use of the "trade acceptance" has been revived in this country in recent years and its usage has become increasingly common through the establishment of the Federal Reserve Bank. It is a recognized form of *promise to*

pay. It serves two important purposes. *First,* it fixes the amount of the debt. *Second,* it makes it possible for the seller, through its discount, to have the use of the funds prior to the day stated for payment. The discountability of the paper depends in a large measure upon the credit standing of the acceptor. If this is not good, the paper is not readily discountable unless it be strengthened, as in this instance, by indorsements.

The rights and obligations of parties to a trade acceptance are covered by the New York Negotiable Instruments Law. Section 112 provides:

> "The acceptor by accepting the instrument acknowledges that he will pay it according to the tenor of his acceptance; • • •."

Upon acceptance a draft becomes in effect a promissory note. The acceptor stands in the place of the maker of a note and is "primarily" liable (United States Rail Co. v. Weiner, et al., 169 App. Div. 561). All other parties are "secondarily" liable (Neg. Inst. Law, §3).

> "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, • • •" (Neg. Inst. Law, §113).
>
> "Every indorser who indorses without qualification, • • • engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, • • •" (Neg. Inst. Law, §116).

Nowhere in the law is the maker of a note, or acceptor of a draft relieved of his "primary" obligation by reason of any indorsements, nor even when collateral is given to secure its payment (First National Bank of Seattle v. Gidden, 175 App. Div. 563).

The original debtor, the acceptor of the seller's drafts, became liable upon delivery of the coal, remained liable by delivery of the "acceptances" and continued liable upon the non-payment of either of them. There was no substitution of one debtor for another, or novation, either by express agreement or presumption of law, as in those cases where the note of a third party alone is given at the time of the creation of the debt. By indorsement of the "acceptances" the three named parties assumed a liability but it was in addition to as well as different from that of the acceptor. Their liability was in respect of the "acceptances" alone, while the acceptor's liability was upon non-payment, at the election of the seller, either on the "acceptances" or in assumpsit under the contract for the value of the coal delivered.

By both the law commercial and the law maritime the taking of debtor's note, whether or not apart from written contract, does not satisfy and terminate the original obligation.

> "By the general commercial law, as well of England as of the United States, *a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties;* it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. *The acceptance of the note is considered as accompanied with the condition of its payment.*" (Italics ours.)
>
> *The Kimball*, 3 Wall. (70 U. S.) 37, 45.

> "The drafts given by the captain upon the owners of the vessel in New York were not received by the libellants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of law in

the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment: it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent."

The Emily Souder, 17 Wall. (84 U. S.) 666, 670.

There is "no local usage to the contrary" in New York, where the effect of the provision of a contract for payment by delivery of purchaser's acceptances has been held to be a mere extension of the time of payment, and that upon default in payment of the acceptances the seller may treat the contract as terminated and sue for the value of the goods furnished (*Kokomo Strawboard Co.* v. *Inman, et al.*, 134 N. Y. 93).

In the case of *The Bird of Paradise*, 5 Wall. (72 U. S.) 545, the contract provided "the freight to be paid in Liverpool * * *, one fourth in cash, one fourth by acceptance of charterer at six months from the final sailing of the vessel and the remainder by like bill, at three months from delivery, etc." The cash was paid on loading and the first of the two acceptances was given but not paid. Mr. Justice Clifford, in giving the decision of this court, referring to the acceptance given but unpaid, stated at page 561:

"Payment of that instalment of the freight is not proved, * * *. Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given."

The Decision of the Circuit Court of Appeals, is in Conflict with the Applicable Decisions of the Court.

This court has thus repeatedly held that the essence is the payment of the money for which the note of the buyer is merely another promise. Such was the instant case, although both courts below held that everything for which the seller had contracted was given in payment and hence the acceptances themselves were payment. They followed the doctrine of those cases where the note of a third party alone was taken in payment. There was no agreement here, express or implied, to relieve the owner of its obligation. On the contrary, it was expressly held liable both by the contract and the "acceptances."

In every case where the note has been presumed to be payment, except where the Massachusetts doctrine prevails, the note has been that of a third party alone and so by a substitution of one debtor for another the original debtor has been relieved from liability. That a novation shall have taken place is essential to this doctrine.

On both principle and authority the notes of the original debtor does not discharge the original obligation, yet both courts below, have disregarded the cited principles of this court and their decisions here are in direct conflict with the foregoing applicable decisions of this court.

POINT II.

By the maritime law one furnishing supplies has a maritime lien therefor.

Prior to the Maritime Lien Act of 1910, there was a very considerable confusion in the law relating to a materialman's lien on vessels. Difficulties and anomalies arose through two early cases decided by this court: *The General Smith*, 4 Wheat. (17 U. S.), 438, decided in 1819, and

The St. Jago de Cuba, 9 Wheat. (22 U. S.), 409, decided in 1824. In the former case Mr. Justice Story held that the maritime law gave a lien for necessaries to a foreign ship or to a ship in the port of the State to which she did not belong, but where the necessaries were furnished in the port or the state to which the ship belonged, the case was governed entirely and solely by the local state lien statutes. In the latter case, Mr. Justice Johnson declared (1) that it was not in the power of any one except the master,—not even the owner himself,—to give implied liens on a vessel; and (2) that when the owner is present "the contract is inferred to be with the owner himself on his ordinary responsibility, without a view to the vessel as the fund, from which compensation is to be derived." Thus the doctrine of presumption of credit to the owner was established in our law.

Since those cases, the courts have been ingenious either to follow or to avoid, by differentiation, their doctrines. As there seemed to be no way of harmonizing the many and varying decisions and of undoing the evils arising from those early cases except through Act of Congress, its aid was sought. Then finally, after repeated efforts, Congress passed the Maritime Lien Act of 1910, C. 373, §1; 36 Stat. 604; Comp. St. 1913, §7783.

The Act of Congress of June 5th, 1920, C. 250, §30, sub sect. P & S; 41 Stat. 1005; 46 U. S. C. A. §§971 and 974, does not differ materially, and so far as concerns the case at bar is similar in all respects to the Maritime Lien Act of June 23, 1910. Section P of the present Act is as follows:

> "Any person furnishing repairs, supplies, towage, use of drydock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and

it shall not be necessary to allege or prove that credit was given to the vessel."

Under Sub-section 8 of the Statute this lien may be waived; the material part of that Sub-section being as follows:

"Nothing in this section shall be construed to prevent the furnisher of repairs, supplies * * * from waiving his right to a lien * * * at any time, by agreement or otherwise."

The Maritime Lien Act Settled the Confusion in the Law and Accorded the Supplier a Lien the Relinquishment of Which Can be Established Only by Clear and Affirmative Proof of Waiver.

Mr. Justice Brandeis in *The Piedmont Coal Co.* case, 254 U. S. 1 (decided in 1920), after referring to the Reports of the Committees of Congress (Senate Report No. 831, 61st Cong., 2nd sess.), says at page 11:

"Those reports state that the purpose of the act was this: *First*, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. *The General Smith*, 4 Wheat. 438. *Second*, to do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises. *The St. Jago de Cuba*, 9 Wheat. 409. *Third*, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. *Peyroux v. Howard*, 7 Pet. 324."

And in the same case it was stated at page 10:

"A vessel may be made liable *in rem* for supplies, although the owner can be made liable therefor *in personam;* since the dealer may rely upon the credit of both. *The Bronx,* 246 Fed. 809."

Since the Act gives to the supplier a maritime lien unless he has *waived such by express agreement or otherwise,* it is a matter for the respondent to establish such waiver by clear affirmative evidence.

Judge Hough has stated the law as follows:

"* * * *the lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment.* 'The Havana', 64 Fed. 496, 12 C. C. A. 361; 'The Yankee', 233 Fed. 919, 147 C. C. A. 593; 'The Oceana' (C. C. A. 2d, Oct. T., 1916), 244 Fed. 80." (Italics ours.)

The Bronx, 246 Fed. (C. C. A. 2), 809, 810.

In the Sixth Circuit the rule has been stated as follows:

"The statute declares a lien in favor of the party furnishing material for the building of the ship. But it does not contemplate that credit shall not be given to the owner, or that he shall not be liable personally for the debt. It is possible, no doubt, for the furnisher to waive the lien; but, unless he does so, the lien exists. *The burden of showing the waiver rests upon the party who alleges it.*" (Italics ours.)

The Winnebago, 141 Fed. (C. C. A. 6), 945, 950.

No longer is the materialmen relegated to the local lien statute when the vessel is in the home port (*The General Smith, supra*). No longer is there a presumption that the supplier dealt on the credit of the owner, when he is pres-

ent, without a view to the vessel as a fund (*The St. Jago de Cuba, supra*). By the statute, the supplier, on order of owner, is presumed to have a lien and may hold the owner *in personam* as well. Such presumption can be destroyed only by clear and affirmative proof of waiver by the party that alleges it.

POINT III.

Petitioner has not waived its right to a maritime lien by agreement or otherwise.

The mere fact that owner's notes were taken would not of itself serve to discharge the lien.

> "The remaining question is, has this lien been forfeited or waived? It does not appear to have been forfeited or waived under any provision in the New York Statute, *nor was it waived upon the principles of maritime law by the acceptance of Graham's notes, unless the claimants can show that the libellants agreed to receive them in lieu of and in place of their original claim.*" (Italics ours.)
>
> *The Steamer St. Lawrence*, 1 Black (66 U. S.) 522, 531-532.

See also:

> *The Kimball*, 3 Wall. (70 U. S.) 37, *supra*;
> *The Emily Souder*, 17 Wall. (84 U. S.) 666, *supra*.

Accordingly, petitioner must have waived its lien, if waived at all, not by the mere taking of the "acceptances" but by the agreement contained in the contract itself to take those "acceptances" or by the requirement of the indorsements thereon, no matter for what purpose it required those indorsements.

The Stipulation of the Contract for Payment by Owners "Acceptances" Does Not Waive the Maritime Lien.

The Bird of Paradise, 5 Wall. (72 U. S.) 545, *supra*, decided not only that the taking of the debtor's acceptance, pursuant to contract, did not discharge the debt but also that it did not waive the maritime lien of the owner for freight.

In that case the charter was for the shipment of a cargo of coal from Liverpool to San Francisco and provided for the payment of freight as follows:

> "The freight to be paid in Liverpool, on unloading and right delivery of the cargo, one-fourth in cash, one-fourth by the acceptance of Eccles, the charterer, at six months from the final sailing of the vessel, and the remainder by like bill, at three months from delivery, at charterer's office in Liverpool, of certificate of right delivery of cargo agreeably to bills of lading, or in cash, less five per cent., at freighter's option. The vessel to be addressed to the freighter's agent abroad. £500 to be advanced in cash at the port of discharge on account of the freight. The ship and her freight are bound to this venture" (p. 546).

Upon loading charterer paid one-fourth freight in cash, and gave his acceptance for a second fourth at six months thereafter. The voyage took eight months and ten days. Before the vessel arrived at San Francisco the charterer became bankrupt and the "acceptance" for the second fourth of the freight was dishonored. On arrival at San Francisco, the £500 agreed to be advanced in cash was paid by freighter's agent; but the final "acceptance" for the residue of freight was not given. The freighter's agents libelled the cargo and secured possession by decree of the District Court.

> "Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and conse-

quently may retain the goods after the arrival of the ship at the port of destination until the payment is made, unless there is some stipulation in the charter-party or bill of lading inconsistent with such right of retention, and which displaces the lien" (p. 554).

"Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. * * * Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether (p. 555).

"Unless, however, the special agreement is absolutely inconsistent with the retention of the goods, the waiver or displacement is not shown, and the right remains" (p. 558).

"Agreement of the parties filed in the case and made a part of the record, shows that the acceptance was presented to the bankrupt court, and that it has never been paid, and it is not pretended that it is of any value. * * * *Payment of that installment of the freight therefore is not proved*, and there is no evidence in the record tending to show that the lien for that instalment of the freight was ever waived. *Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given.*" (Italics ours.) (P. 561).

This case is identical with the one at hand in that in each the agreement provides the debt is to be paid by notes. In *The Bird of Paradise*, *supra*, the contract expressly provided for payment of the second fourth of the freight

by charterer's "acceptance" at six months and it was expressly held that the delivery and receipt of this acceptance by the owner did not constitute payment of the debt or a waiver of the lien for freight; as the voyage took eight months and ten days it must have been within the contemplation of the parties that the draft would be paid before the vessel arrived and its cargo delivered. This court held the ship-owner was entitled to hold the cargo until the amount represented by this draft, which was dishonored, was paid.

The court held, however, that as the last draft was not to be paid until three months from delivery at charterer's office in Liverpool of certificate of right delivery of cargo, the parties contemplated a delivery of the cargo prior to the maturity of that draft and to the extent of that draft owner had waived its lien.

A similar result was reached by the Circuit Court of Appeals for the Eighth Circuit in *Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 F. (C. C. A. 8) 855. The contract there provided for delivery of certain materials, buyer to pay part cash on signing the contract, a further installment on delivery of the materials, and the final amount "to be paid by your note at sixty (60) days * * * not later than sixty (60) days from arrival of last shipment." The contract further provided title and ownership should remain in the seller and that it might retake possession "in default of the last payment being made." The note was given but was dishonored. Seller brought replevin but the action was dismissed by the District Court, on the ground that the Mayflower Company had made the last payment in accordance with the terms of the contract even though the note itself was not paid. Circuit Judge Sanborn, in rendering the opinion of the appellate court, reached the conclusion that the seller's security was not released.

> "Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is

doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract (p. 857).

Where the extinguishment of a debt has the effect to strike down a lien or a title securing its payment, the presumption that it is not discharged by the acceptance of the note of the debtor in payment of it is strengthened, because in such a case the discharge of a lien is more unusual and unreasonable. The Kimball, 3 Wall., 37, 45, 18 L. Ed., 50; Sweet & Carpenter v. James, 2 R. I., 270, 294, 297; "The Bird of Paradise", 5 Wall., 545, 18 L. Ed., 662 (p. 858).

* * * *it is only when there is a clear agreement by the creditor that the note of the debtor shall discharge the debt and that the creditor will take the risk of the payment of the note, or an indubitable intention of the parties to that effect, that a creditor's acceptance of such a note extinguishes the debt or releases its security* * * *." (Italics ours.) (P. 859.)

The Decision of the Circuit Court of Appeals in Respect of Waiver by Stipulation for Notes is in Conflict with Decisions of this Court and the Circuit Court of Appeals for the Eighth Circuit.

In its decision, the court below, quoting *Phelps* v. *The Camilla*, Taney 400 Fed. Cas. No. 11073, said in substance:

"If the party does not choose to rely on the contract which the maritime law implies in such case, but takes an express written contract, he must rely on the con-

> tract he makes for himself, * * * and if he takes a note or bill of exchange * * * he is presumed to rely on that security and to waive his lien, * * *" (R. 32).

In *The Bird of Paradise, supra,* we had both a special written contract providing how payment should be made and the acceptance of a note thereunder yet this court held the lien not waived. There is an irreconcilable conflict between that case and the case at bar.

And again the court below said: "No lien can exist in favor of the material man when he receives in payment that for which he stipulated when the contract was made." In the *Læschen Rope Co.*, case, *supra,* the security for the last payment was that of title given by the contract. In the instant case the statute says the supplier shall have a lien (but that it may be waived). This provision of the statute is as much a part of the contract as though written into it by the parties. In the *Læschen Rope Co.*, case it was held that the security was not waived or released by the contract and the accepting of the note thereunder. This brings these two decisions, the one in the 2nd Circuit and the other in the 8th Circuit, in direct conflict. The one in the 8th Circuit follows the previously cited decisions of this court.

The Stipulation of the Contract Requiring Indorsement of Owners "Acceptances" Did Not Waive the Maritime Lien.

The court below considered the requirement of the three individual indorsements which, in an affidavit used in its civil suit, petitioner stated was "*part* of the consideration of the sale" and that without the consideration of such indorsement "it never would have sold the coal," as being a stipulation coming within the rule stated by this court in *The Bird of Paradise, supra* (R. 32, 34). The language of that rule, appearing at page 555, is as follows:

> "Presumption is in favor of the lien, as already explained, but it may be modified, or it may be excluded or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right * * *."

As a matter of mere application of this rule, without any precedent whatsoever, it is impossible to see how the court could have reached any such conclusion. There are no "direct words" in the contract that displace or exclude the lien the statute gives. There is no "stipulation wholly incompatible or irreconcilable with the existence" of the lien—as in the case of the final acceptance in *The Bird of Paradise*, supra, which was not payable until after the freight lien must have been discharged by delivery of the cargo. The security of the lien and the security of the indorsements may exist side by side without conflict and without affecting the equities of other creditors of the vessel.

Nor does the evidence strengthen the conclusion of the lower court.

The indorsements were there stated to be only "*part* of the consideration." Quaere: What was the rest? Not the "acceptances" themselves for they were but another promise of the *original debtor* to pay. Obviously it must have been the lien on the vessel which the law conferred. This lien could not be taken to the bank and used as collateral and neither could the owner's un-indorsed "acceptances." Petitioner "wanted to get trade acceptances in order to get the money at any time they wanted—in fact to discount that paper" (R. 9).

The conclusion of the court below is based on inference. This was not only unsound but is contrary to the presumption created by the Maritime Lien Act. Judge Hough in that same Circuit said in *The Bronx*, 246 F. (C. C. A. 2) 809, 810, the lien is presumed

> "Until such presumption is destroyed by affirmative proof that the promising party was to be exclusively liable for payment."

The analogy of the facts in that case with those of the instant case is exact. In that case "Wolfe, an officer of alleged owner, agreed with libellant that either he or the owner would pay for the supplies in question." The promise of Wolfe was no different in effect from the indorsements: each was security for the obligation of the original debtor. Judge Hough allowed the lien.

This Decision of the Circuit Court of Appeals is in Conflict with the Decisions of the Circuit Courts of Appeals for the 5th Circuit, Which Support the Lien.

In *El Amigo*, 285 F. (C. C. A. 5) 868, the City of Houston took the bond with surety of one Miller, who seemed to be the one in whom was the management of the vessel at that port. This bond was to secure "all dockage and other charges accruing in favor of the City from ships operated by Miller." In that case the court held, at pages 870, 871:

> "• • • The terms of the bond do not indicate that the acceptance of it was intended to have the effect of waiving, releasing, or discharging any lien the city might acquire. There was no evidence that the city consented to give up its lien, or that the bond was accepted in lieu of claims which might arise in the city's favor for wharfage, etc. That being so, the city's acceptance of the bond did not deprive it of its lien."

Again in that same Circuit it was held that a reservation of title to machinery supplied to a vessel did not operate as a waiver of the lien:

"• • • Furthermore, the libel showed that the equipment covered by the written contract was furnished by the appellee to the boat on the order of its owner. The retention by contract of the title to such equipment as security for the purchase price was not inconsistent with the existence of the lien given by the statute, and did not prevent the appellee from asserting that lien."

Ricou v. Fairbanks, Morse & Co., 11 F. (2) (C. C. A. 5) 103, 104, 105.

To the same effect as the last case are those of *The E-2*, 16 F. (2) (D. C. Mass.) 1005, and *The Pearl*, 189 F. (D. C. No. Car.) 540.

None of the foregoing decisions can be reconciled with the decision below. In no instance was any mention made of retention of security of the vessel, and in each case other security was provided by agreement made prior to incurring the debt. The decisions of the 2nd and 5th Circuits are clearly in conflict with one another as is this instant decision of the 2nd Circuit with its earlier decision in *The Bronx*, *supra*. The decision in *The Bronx* has already received the approval of this court in *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 10, *supra*.

Conclusion.

It is submitted that the petitioner has established its right to a lien which respondent has not shown by clear and affirmative proof to have been relinquished and that accordingly the decrees below should be reversed and the cause remanded with directions for a decree in favor of the petitioner for the full amount of its claim, $9,382.60, with interest from March 6, 1925, with costs.

Respectfully,

GEORGE WRIGHT HINCKLEY,
For the Petitioner.